

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
D.W.E., INC.)	
d/b/a REFLECTIONS, INC.)	PERMIT NO. RR49-20749
2709 N. SHADELAND AVENUE)	
INDIANAPOLIS, INDIANA 46219)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

D.W.E. d/b/a Reflections, Inc. (“Applicant”), located at 2709 N. Shadeland Avenue, Indianapolis, Indiana 46219, permit number RR49-20749, is the applicant for a type 209 Alcohol and Tobacco Commission (“Commission” or “ATC”) permit. The application was assigned to the Marion County Local Alcoholic Beverage Board (“Local Board”). On June 7, 2004, the Local Board heard the application request and on that same day, voted 4-0 to deny the application. The Commission adopted the Local Board’s recommendation on June 15, 2004. The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on April 18, 2005, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript, video tape transcript of the Local Board hearing, the evidence submitted to the Commission during the appeal hearing, contents of the entire Commission file, and the evidence submitted subsequent to the appeal hearing, now tenders her Proposed Findings of Fact and Conclusions of Law for recommendation to the members of the Commission.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. Dallas W. Eaton, principal of DWE, Inc.
 2. Shelley Eaton, proposed manager of DWE, Inc.
 3. Terry Winton, realtor.
- B. The following exhibits were introduced before the Local Board in favor of the Applicant:
1. Exhibits A and B: describing “pre-conditions” to obtaining zoning approval.
 2. Exhibits C, D, E, F and G: depicting additional conditions for zoning approval.
 3. Exhibit H: Zoning Base Map, showing subject site and surrounding zoning area.
 4. Exhibit I: petition in support of the Applicant by surrounding businesses.
 5. Exhibit J: letter of zoning approval from City of Indianapolis.
 6. Exhibit K: zoning notification letter from City of Indianapolis regarding additional repairs.
 7. Exhibit L: map depicting other adult entertainment businesses in the surrounding area.
 8. Exhibit M: black and white photo—from Indianapolis Star.
- C. The following individuals appeared and/or testified before the Local Board against the Applicant:
1. City County Council Mary Moriarty Adams, representing District 17.
 2. Greg Earnest, representing 38th and Shadeland Neighborhood Association and an owner of a business located in the Shadeland Corridor.
 3. Ron Hackler, a resident and a member of the 38th and Shadeland Community Improvement Association.
 4. Norman Pace, President of Far Eastside Neighborhood Association.
 5. Sharon Tabard, President of Eastgate Neighborhood Association.
 6. John Sweezy, Jr., President of Warren Township Development Association.
 7. Dave Lee, Kite Company, Mid-America Labs, 2650 N. Shadeland Avenue.
 8. Steven Glazier, attorney for Motel Six, located adjacent to the proposed location.
 9. John Bellows, area manager for Motel Six.
- D. The following exhibits were introduced before the Local Board against the Applicant:
1. Letter from City County Council Mary Moriarty Adams requesting denial of Applicant’s permit. Dated December 31, 2003.
 2. Letter from 38th & Shadeland Community Improvement Association requesting denial of Applicant’s permit. Dated December 26, 2003.
 3. Letter from Re-Power! requesting denial of Applicant’s permit. Undated.
 4. Letter from Lambert Group estimating cost of repairs. Dated January 14, 2004.

5. Letter from Sun Development requesting denial of Applicant's permit. Dated May 24, 2004.
6. Two letters from Community Alliance of the Far Eastside, Inc. requesting denial of Applicant's permit. Dated January 1, 2004 and May 24, 2004.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Dallas W. Eaton, principal of DWE, Inc.
2. Shelley Eaton, proposed manager of DWE, Inc.

B. The following exhibits were introduced and admitted before the Commission in favor of the Applicant:

1. Copy of lease between Applicant and P & G Investments, Inc.
2. Indianapolis Police Runs for 2851 N. Shadeland Avenue, d/b/a Motel Six.
3. A photograph depicting present condition of the building.
4. Definition of "integrated center" from the Marion County Commercial Zoning Ordinance.
5. Enlarged base map showing the commercial/industrial nature of the proposed area.
6. Adult Use Survey for Marion County.
7. Copy of Sewer Easement relating to subject site.
8. Copy of Access Easement relating to subject site.
9. Supplemental authority, *O'Banion v. State*, 253 N.E.2d 739 (Ind. App. 1969).

C. The following individuals testified before the Commission against the Applicant in this cause:

1. City County Council Mary Moriarty Adams, representing District 17, an area that includes the proposed location.
2. Norman Pace, President of Far Eastside Neighborhood Association and a Board Member of the Warren Development Association.
3. Greg Earnest, representing 38th and Shadeland Neighborhood Association and an owner of a business located in the Shadeland Corridor.

D. The following exhibits were introduced and admitted before the Commission against the Applicant in this cause:

1. *Adult Entertainment Businesses in Indianapolis, An Analysis*, 1984.
2. Letter from City County Council Mary Moriarty Adams requesting denial of Applicant's permit. Dated May 24, 2004.
3. Letter from Eastgate Neighborhood Association requesting denial of Applicant's permit. Dated May 18, 2004.

4. Map depicting other similar businesses located around the proposed location.

IV. FINDINGS OF FACT

1. The Applicant, D.W.E. d/b/a Reflections, Inc., located at 2709 N. Shadeland Avenue, Indianapolis, Indiana 46219, permit number RR49-20749, is the applicant for a type 209 ATC permit. (Local Board Hearing; ATC File)
2. Applicant filed with the Commission its application for a permit at this location that was subsequently referred to the Local Board. (ATC File)
3. On or about June 7, 2004, the Local Board denied Applicant's permit application by 4-0 vote and found by substantial evidence that it should not be entitled to the ATC permit. (ATC File; Local Board Hearing)
4. Credible evidence supports the Local Board's decision. (Local Board Hearing)
5. On June 16, 2004, the Commission adopted the recommendation of the Local Board. (ATC File)
6. The Hearing Judge took judicial notice of the entire Commission file, including but not limited to, the Local Board transcript, the ATC file, and the application for the permit at issue. (ATC Hearing)
7. Dallas Eaton is the principal of the permit application. (ATC File; Local Board Hearing; ATC Hearing)
8. Dallas Eaton serves as the manager for a business known as the Red Garter, 437 S. Illinois Street, Indianapolis, Indiana. (ATC File; Local Board Hearing; ATC Hearing)
9. Dallas Eaton established that he had a record of near "incident free" operation of a similar business. (ATC Hearing)
10. The permit premise is owned by P & G Investments, Inc., subject to a conditional lease to

the Applicant. (ATC Hearing; ATC File)

11. The Remonstrator, Motel Six, had numerous police runs in the year preceding the Local Board hearing date. (Local Board Hearing; ATC Hearing; Applicant's Exhibit "2")

12. Applicant is not in a residential area or within two hundred feet of a church or school. (ATC File; Local Board Hearing; ATC Hearing)

13. The City of Indianapolis has given zoning approval for the Applicant's proposed location. (Local Board Hearing; ATC Hearing)

14. Several remonstrators have voiced concerns before the Local Board and the Commission about the "adult entertainment" nature of the proposed business. (Local Board Hearing; ATC Hearing; Testimony of Norman Pace, Greg Earnest, Dave Lee and Steven Glazier)

15. Neither the Local Board nor the Commission may deny a permit to an otherwise qualified applicant solely on the basis that adult entertainment is being provided on the premises. Instead, the record demonstrates that the Local Board denied Applicant's permit based on the community's lack of desire for the proposed services and the deleterious impact that granting the permit would have on that community. (Local Board Hearing)

16. The Commission is statutorily charged to investigate a permit issuance in regard to its proposed geographical location; determine the need for such services at the proposed location; the desire of the neighborhood or community to receive such services; and the impact of the proposed permit location on the community and neighborhood and on area businesses. 905 IAC 1-27-4. Although the Applicant presented evidence to support his position that the issuance of the permit would not negatively impact the community or surrounding businesses, it was not enough to overcome the overwhelming evidence in the record as a whole supporting the Local Board's decision denying the permit to the Applicant. (ATC Hearing; Local Board Hearing;

ATC File)

17. Substantial evidence indicates that the neighborhood and community do not need or desire the proposed services. The testimony of the remonstrating witnesses was persuasive and credible. (ATC Hearing; Local Board Hearing; ATC File)

18. The community and neighborhood would not benefit from the issuance of the permit. (ATC Hearing; Local Board Hearing; ATC File)

19. The permit application was unanimously rejected by the Local Board. (Local Board Hearing; ATC File)

20. The facts and substantial evidence favor supporting the permit denial. (ATC Hearing; Local Board Hearing; ATC File)

21. The Commission may grant or refuse the permit application accordingly as it deems the public interest will be served best.

22. The Commission has the responsibility to regulate alcoholic beverages in a manner consistent with the desires of local communities.

23. Any finding of fact may be considered a conclusion of law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Indiana Code § 7.1-1-2-2 and § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).
6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).
7. The proposed permit location is appropriate for the use, and does not violate the provisions of Indiana Code § 7.1-3-21-11 or any city zoning provisions.
8. The issue of zoning approval is within the sole discretion of the City and the granting of an alcoholic beverage permit is within the sole province of the Commission. *O'Banion v. State*, 253 N.E.2d 739 (Ind. App. 1969).
9. Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 659 (Ind. App. 1992); *see also Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. App. 2002).
10. Based on the entire record, the Local Board's decision to deny the Applicant's permit is based on reasonable and sound evidentiary support, and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.* 615 N.E.2d 100, 104 (Ind. App. 1993).

11. The Commission is charged to uphold local board action on a permit application unless upon review that action runs contrary to the well-established provisions of Indiana Code 7.1 and 905 Indiana Administrative Code.

12. The Commission's denial of the permit on June 16, 2004 was based upon the recommendation of the Local Board, and was based upon substantive and substantial evidence.

13. The local board is charged to conduct an investigation of an alcohol permit application even before the Commission may act. Ind. Code § 7.1-3-19-3. The statute gives local boards discretion to consider any and all relevant source of information. Ind. Code § 7.1-3-19-8.

Although the Commission may conduct its own investigation (Ind. Code § 7.1-3-19-10), it is also required to follow the local boards' recommendations unless they are arbitrary, capricious, contrary to a constitutional right, outside statutory jurisdiction, without observance of required procedures, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

14. The Commission is required to follow the recommendation of the local board when the local board votes to deny an application by a majority vote. *Indiana Alcoholic Beverage Commission v. Harmon*, 379 N.E.2d 140, 147 (Ind. 1978).

15. The Commission may investigate a permit issuance in regard to its geographical location; determine the need for such services at the proposed location; the desire of the neighborhood or community to receive such services; and the impact of the proposed permit location on the community and neighborhood and on area businesses. 905 IAC 1-27-4.

16. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

17. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

18. A determination of whether there exists a need for the permit, a desire for the services, and to what degree of impact of such services on the neighborhood and businesses turns on the facts on each case. *Id.*

19. Viewed as a whole, the record demonstrates that the community does not need or desire the proposed services. Substantial evidence shows that the issuance of the permit is not in the public's best interest. 905 IAC 1-27-4(a); Ind. Code § 7.1-3-19-10.

20. The Commission shall follow the Local Board unless upon review of that recommendation it finds that to follow that recommendation would be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

21. The Local Board's decision in denying the issuance of permit to the Applicant was not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*

22. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Indiana Alcohol & Tobacco Commission in denying the application for the Applicant, D.W.E. d/b/a Reflections, Inc., located at 2709 N. Shadeland Avenue, Indianapolis, Indiana 46219, permit number RR49-20749, was based on substantial evidence and must be sustained. It is

further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was not sufficient to overturn the recommendation of the Marion County Alcoholic Beverage Board or to issue a finding in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant for the Type 209 permit is hereby DENIED and the recommendation of the Local Board in this matter is UPHELD.

DATED: _____

U-Jung Choe, Hearing Judge
Indiana Alcohol & Tobacco Commission